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Nos. 85-245 and 85-5323

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1985

JEROME C. UTZ, PETITIONER

v.

UNITED STATES OF AMERICA

MARK WELLINGTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the trial court improperly amended the indictment when it struck unproven allegations.

2. Whether there was a fatal variance between the indictment and proof.

3. Whether co-conspirator statements were improperly admitted because the government made no showing that the declarant was unavailable to testify.

4. Whether co-conspirator statements were admitted in violation of the rule of *Bruton* v. *United States*, 391 U.S. 123 (1968).

TABLE OF CONTENTS

	Page
Opinion	1
Jurisdiction	2
Statement	2
Argument	4
Conclusion	9

TABLE OF AUTHORITIES

Cases:

Bruton v. *United States*, 391 U.S. 123	8, 9
United States v. *McCown*, 711 F.2d 1441	8
United States v. *Inadi*, cert. granted, No. 84-1580 (May 28, 1985)	7, 8
United States v. *Miller*, No. 83-1750 (Apr. 1, 1985)	5, 6
United States v. *Ordonez*, 737 F.2d 793	8
United States v. *Rogers*, 652 F.2d 972	8
United States v. *Singer*, 660 F.2d 1295, cert. denied, 454 U.S. 1156	8

Constitution, statutes and rules:

U.S. Const.:	
Amend. V	5
Amend. VI (Confrontation Clause)	6
Travel Act, 18 U.S.C. 2314	2
18 U.S.C. 1341	2
Fed. R. Crim. P. 7(d)	4
Fed. R. Evid. 801(d)(2)(E)	6

Miscellaneous:

1 C. Wright, *Federal Practice and Procedure* (1982)	4

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OPINION

The opinion of the court of appeals (Pet. App. A1-A22)[1] is reported at 754 F.2d 1457.

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[1] "Pet. App." refers to the appendix to the petition in No. 82-245.

JURISDICTION

The judgment of the court of appeals was entered on March 4, 1985. A petition for rehearing was denied on June 21, 1985 (Pet. App. A24). The petition for a writ of certiorari in No. 85-245 was filed on August 13, 1985, and the petition in No. 85-5323 was filed on September 3, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Eastern District of California, petitioners were convicted on seven counts of mail fraud, in violation of 18 U.S.C. 1341, and two counts of transporting stolen property in interstate commerce, in violation of the Travel Act, 18 U.S.C. 2314. They were each sentenced to concurrent three-year terms of imprisonment on each count. All but six months of Utz's sentence was suspended in lieu of three year's probation. The court of appeals affirmed (Pet. App. A3-A22).

The evidence at trial is summarized in the opinion of the court of appeals (Pet. App. A3-A5). It showed that while in the federal witness protection program, David Wellington met petitioner Utz, who was a deputy attorney general for the State of California. Utz assisted David Wellington in obtaining clearance from the witness protection program to engage in house construction. David Wellington was joined in this venture by his son, petitioner Mark Wellington, and a friend, Michael Cano. Utz became a silent partner in the enterprise (*id.* at A3-A4).[2]

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[2] Utz assisted petitioner Wellington and his father, who had four previous convictions on charges related to his involvement in fraudulent schemes, in obtaining a legal name change to "Wellington" from "Pedley" (Pet. App. A3).

In 1976, David Wellington and his associates recruited a sales force and began to solicit investors for their real estate development in Placerville, California. They created Mission Vectors, Inc., which owned an airplane that was used to fly potential investors to Placerville. On arriving in Placerville, potential investors were told that the proposed development would proceed in four stages. First, the investors would purchase lots—which would be free and clear of liens and encumbrances—from Pacific Park Properties for $10,000 each. Second, the developers would arrange construction loans in the investors' names. Third, Cano Construction Company would use the funds to construct houses on the lots. Brochures provided to the investors stated that Cano Construction had been constructing houses successfully since 1974. Fourth, Diamond Pacific Realty would market the completed homes. The investors were told that they would recover their down payments and receive any profits that were realized (Pet. App. A4).

Several of the above representations were false. All of the lots were subject to substantial liens, many of which were soon the subject of foreclosure proceedings. Pacific Park Properties did not even own some of the lots. Cano Construction was created in 1976 rather than 1974, and none of the principals had substantial experience in construction (Pet. App. A4). Finally, a substantial amount of money borrowed on behalf of the investors was directed to other uses, including the rental of a Mercedes for each of the principals, the development of a potential television series, and investments in private ventures (*id.* at A4-A5).

Several investors either discovered the misrepresentations or grew impatient with the lack of prog-

ress in the construction of their houses. To lull those investors into a false sense of security, David Wellington and his associates made further misrepresentations and placed money into escrow accounts. This money subsequently was diverted into other accounts. Pacific Park Properties, Cano Construction, and Diamond Pacific Realty all declared bankruptcy in August 1978 (Pet. App. A4).

ARGUMENT

1. The original indictment charged petitioners with a wide range of unlawful acts relating to the fraudulent land sales scheme. At trial, petitioners moved to strike several unproven allegations as surplusage. After the government admitted that various allegations were unproven, the district court struck those allegations. The original indictment was then retyped with the deleted allegations omitted, and the redacted indictment was submitted to the jury. Petitioners contend (85-245 Pet. 9-11, 14-15; 85-5323 Pet. 6-7) that the indictment was thereby impermissibly amended.

Insofar as petitioners challenge the mere physical alteration of the indictment, the court of appeals correctly held (Pet. App. A6 n.1) that they waived the claim by moving for removal of surplusage under Fed. R. Crim. P. 7(d). Petitioner Utz's assertion that no such waiver occurred is belied by the record. See 17 Tr. 2793. In any event, it is well settled that the withdrawal from the jury of parts of the indictment that the evidence does not support is not an impermissible amendment. See 1 C. Wright, *Federal Practice and Procedure* § 127, at 422 (1982).

Petitioners contend—in an argument the court of appeals held was not waived by the Rule 7(d) mo-

tion (Pet. App. A6 n.1)—that the altered indictment improperly charged them with a different offense from that alleged in the original indictment. This contention also lacks merit. The deleted allegations concerned the identity of certain victims of the fraudulent scheme, certain misrepresentations made in furtherance of the scheme, and certain of the affiliations of petitioners with the various business entities. However, the vast majority of the transactions and misrepresentations charged in the original indictment were submitted to the jury for their consideration. As both courts below correctly concluded (Pet. App. A7), "the altered indictment charged [petitioners] with perpetrating the same essential fraudulent scheme that was alleged in the original indictment." This concurrent finding of both lower courts does not warrant this Court's review.

In support of their contention that the redacted indictment impermissibly changed the charged offense, petitioners cite this Court's recent decision in *United States* v. *Miller*, No. 83-1750 (Apr. 1, 1985). In *Miller*, the defendant was alleged to have defrauded his insurer in connection with a burglary at his place of business both by consenting to the burglary in advance and by lying to the insurer about the amount of the loss. The proof at his trial, however, concerned only the latter allegations, and the defendant was convicted. On appeal and in this Court, the defendant contended that he had been deprived of the Fifth Amendment right not to be tried for a felony except upon indictment by a grand jury because the trial proof established a significantly narrower fraudulent scheme than the one charged by the grand jury in the indictment. Rejecting this argument, the Court explained that it does not constitute

an impermissible amendment "to drop from an indictment those allegations that are unnecessary to an offense that is clearly contained within it." Slip op. 14. Accordingly, far from supporting petitioners' contention, *Miller* dooms it.

2. Petitioners contend (85-245 Pet. 12-14; 85-5323 Pet. 6-7) that there was an impermissible variance between the proof at trial and the indictment in that the proof at trial revealed the existence of multiple schemes rather than a unitary scheme to defraud. The court of appeals agreed with petitioners that it would have been possible for the jury to find multiple schemes (Pet. App. A8 n.3). However, the court observed that the jury did not so find, having been properly instructed that it could not convict unless it determined that petitioners had engaged in the single scheme charged in the indictment (*id.* at A8 n.3, A9). The court then concluded that a rational trier of fact could have found a single scheme beyond a reasonable doubt (*id.* at A8 n.3). That fact-bound determination does not warrant this Court's review.

3. At trial, the district court admitted testimony relating certain out-of-court utterances made by co-conspirator David Wellington in furtherance of the fraudulent scheme. Petitioners contend (85-245 Pet. 15-22; 85-5323 Pet. 7-9) that this testimony was hearsay and that it was inadmissible under the Confrontation Clause because the government failed to make a sufficient showing that David Wellington was unavailable to testify. The issue of whether the Confrontation Clause bars the prosecution from introducing traditionally admissible co-conspirator declarations (see Fed. R. Evid. 801(d)(2)(E)) unless it establishes that the declarant is unavailable to tes-

tify at trial is currently before this Court in *United States* v. *Inadi*, cert. granted, No. 84-1580 (May 28, 1985). It is not necessary for the Court to hold the petition pending the decision in *Inadi*, because the decision in *Inadi* will not in any event affect the outcome of this case.

In rejecting petitioner's challenge to the admission of David Wellington's out-of-court statements, the court of appeals correctly held that all but one of the statements were not hearsay because they consisted either of false representations made to potential investors that were not offered to prove the truth of the matter asserted or of incidental comments and instructions to employees the truth of which was not relevant to any issue at trial (Pet. App. A11). With respect to the single out-of-court statement by David Wellington that would have been hearsay if not made in the course of the conspiracy—the statement that he and Utz were friends and that a car had been purchased for Utz—the court correctly concluded that any error in admitting the statement was harmless because it was cumulative of other evidence (*id.* at A11-A12).[3] The court of appeals' fact-bound determinations that all but one of the challenged statements were not hearsay and that any error in admitting the remaining statement was harmless do not warrant this Court's review and eliminate any need to reach the *Inadi* issue in this case. Finally, we note that the Ninth Circuit, which rejected petitioners' Confrontation Clause argument in this case, has

[3] Utz described his friendship with David Wellington in great detail on direct examination. Charles White, an employee of Cano Construction, gave nonhearsay testimony concerning the purchase of the car by Cano Construction (Pet. App. A12).

held, like the Third Circuit in *Inadi*, that a co-conspirator statement may not be admitted unless the declarant is produced or is shown to be unavailable. See *United States* v. *Ordonez*, 737 F.2d 793, 802-804 (9th Cir. 1984). Accordingly, even if the Third Circuit's decision in *Inadi* were affirmed, the Ninth Circuit's decision in the present case would not be affected.

4. Petitioner Utz contends (85-245 Pet. 5-7, 22-23) that the admission of certain of David Wellington's out-of-court utterances violated the rule of *Bruton* v. *United States*, 391 U.S. 123 (1968). In *Bruton* this Court held that the admission at a joint trial of a co-defendant's extrajudicial confession that incriminates the defendant violates the defendant's right to confrontation when the co-defendant does not testify at trial. *Id.* at 126. At the outset, we note that Utz did not raise this issue on appeal and thereby waived it.

In any event, Utz's claim is without merit. David Wellington's statements were admissible under the co-conspirator exception to the hearsay rules—as the district court held—and therefore *Bruton* is inapplicable. See, *e.g.*, *United States* v. *McCown*, 711 F.2d 1441, 1448-1449 (9th Cir. 1983); *United States* v. *Singer*, 660 F.2d 1295, 1307 (8th Cir. 1981), cert. denied, 454 U.S. 1156 (1982); *United States* v. *Rogers*, 652 F.2d 972, 976 (10th Cir. 1981). Moreover, as previously noted, the court of appeals held that any error in the admission of these statements was harmless. Hence, with respect to these statements, the *Bruton* issue is wholly academic. And in any event, these statements were not so "powerfully incriminating" of Utz as to qualify as *Bruton* statements. 391 U.S. at 135.

Utz also challenges on *Bruton* grounds the testimony of government witness Larry B. Myers concerning Mission Vectors' ownership of the airplane that flew potential investors to Placerville. However, the record indicates that Myers testified about the airplane from his own personal knowledge; he did not relate any extrajudicial statement by David Wellington concerning the airplane (1 Tr. 131-132). Accordingly, *Bruton* is inapplicable to the challenged testimony.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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